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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

NO. 73-1987

ROBERT VENETUCCI,

Petitioner,

-against-

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. .....

ROBERT VENETUCCI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Robert Venetucci, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit, hereinafter described.

OPINIONS BELOW

The opinion of the Court of Appeals, printed in the appendix hereto, infra, is not yet reported.

JURISDICTION

The judgment of the Court of Appeals affirming the October 19, 1973 judgment of the District Court (E. D. N. Y., Judd, J.) was entered May 7, 1974. On May 21, 1974 petitioner filed a timely petition for rehearing. Said petition, printed in the appendix hereto, infra at was denied June 5, 1974 (51a). The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

QUESTIONS PRESENTED

1. Was Petitioner denied a fair due process trial, and his statutory (Federal and New York State) and Federal Constitutional rights to be free from illegal electronic search and seizure, by the totality of the circumstances of this prosecution?

2. Was the Court of Appeals denial, on June 5, 1974, of petitioner's petition for rehearing, made in order to correct the clear, obvious and incredible factual inaccuracies in that Court's opinion of May 7, 1974 (specifically point (d)) a violation of petitioner's due process rights under the Constitution of the United States?

3. Was petitioner denied a fair trial by prejudicial rulings on defense objections to admission of evidence (aside from the prejudicial electronic proofs, covered by Question No. 1), especially the reception of "expert" testimony "interpreting" the alleged "heroin jargon" on the electronic tapes?

4. Was petitioner denied a fair due process trial by reception of proofs as to possession of cocaine by other defendants, an offense not charged in the indictment, and the cocaine in question having been seized at a stage of the alleged conspiracy or double conspiracy long after any proved or provable participation by petitioner?

5. Was the evidence as to petitioner sufficient for submission to the jury and for conviction?

6. Was petitioner convicted of conspiracy in violation of the rules against illegal prosecution for double conspiracy; and if this Court reverses petitioner's conviction for conspiracy, should it not also reverse his convictions on the substantive counts, under the rule of United States v. Bentvena, 319 F. 2d 916, 955-956 (2nd Cir. 1963), cert. den. 375 U. S. 940?

7. Petitioner adopts those points of co-petitioners which are relevant and helpful to his case.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the Fourth and Ninth Amendments (search and seizure, and privacy), the Fifth Amendment (due process) of the United States Constitution. It also involves Rules 7(f) and 16(a), F. R. Cr. P. (Bill of Particulars and Discovery).

STATEMENT OF THE CASE

Petitioner seeks review of a judgment of the United States Court of Appeals for the Second Circuit, which on May 7, 1974, affirmed the judgment of the United States District Court for the Eastern District of New York (Judd, J.) entered October 19, 1973, convicting the appellant Venetucci, after a jury trial, on one count of conspiracy and two substantive counts involving heroin, and sentencing him to nine years plus seven years special parole. Petitioner also seeks review of the denial of petitioner's petition for reargument denied June 5, 1974, treated separately, infra.

The Government contended that Venetucci bought or tried to buy a kilogram of heroin from co-defendants Cirillo, Murphy and Sorrentino between about January 18 and January 22, 1973. The only proof that the parties were dealing in heroin during the alleged January 1973 transactions consisted of physical surveillance proofs of the usual sort as to peregrinations, meetings, etc., of the

parties, and the usual alleged "brown paper bag" allegedly seen by government agents during the night-time from long distances away, plus telephone wire taps "interpreted" by an "expert" in the camouflaged "jargon" of heroin traffickers; i.e., there was neither physical proof nor any other direct evidence of any kind that any of the defendants actually had or were dealing in any heroin in the January 1973 happenings.

Venetucci totally faded out of the within trial proofs within a few days after the January 1973 happenings. No arrests were made at that juncture. And this was the last we hear of Venetucci in the investigative scene of this case.

The Government claims that it then picked up a heroin trail as to several of the co-defendants -- not as to Venetucci -- around the middle of March 1973, and this time the Government made arrests and claims to have seized narcotics inculpating co-defendants. The narcotics consisted of about one-half kilogram of heroin and a small quantity of cocaine (there were no cocaine charges in this indictment, and the cocaine involved undisputedly had no connection with Venetucci).

Thus, the Government's inclusion of Venetucci, an alleged single-transaction buyer in January 1973, with an alleged ring of heroin suppliers in March 1973, emerges on this trial record as one of those arbitrary prosecutive tactics in which a defendant has been swept up

unjustly in a typical "continuing conspiracy" whirlwind. The indictment inferentially supports our contention that Venetucci had no part in the alleged March 1973 heroin happenings, as there is no substantive count against Venetucci and no conspiracy overt acts alleged as to him based on the March 1973 happenings.

As to the January 1973 substantive charges against Venetucci (counts 3 and 4), the Government's proofs, if believed, were that Venetucci was unable to raise the money for the alleged heroin purchase at that juncture and that co-defendants forced him to return the heroin -- all of which is probatively fanciful or at best utterly speculative, because, as above recited, the alleged kilogram of heroin in January 1973 remains a phantom item whose actual existence the Government never demonstrated by physical proof or by any other direct evidence.

The Venetucci defense in this trial contended that the proofs of meetings and peregrinations involving Venetucci were insufficient for submission to the jury; and that, as to the wire tap proofs, (1) tapes of conversations of co-defendants referring to "Bobby" were not probative that "Bobby" was Robert Venetucci because such identification is purely speculative and because the actual person indicated by the name of "Bobby" was "Bob the Greek" on the tapes, the Government offering no proof identifying "Bob the Greek" with Robert Venetucci; and (2) the tapes on which Venetucci's own voice allegedly appears are

unprobative for lack of voice identification and were in any event unconstitutionally admitted into evidence.

Aside from the electronic proofs, the principal testimony in this trial directly relating to Venetucci appears in the trial minutes at Tr. 236-240, 275-290, 380-394, 488-489, 570-575, 611-630, 634-645, 677-681, 688-696, 762-791.

Concerning petitioner's petition for rehearing summarily denied June 5, 1974, said petition was made in order to correct clear, obvious and incredible inaccuracies in the Court of Appeals' opinion concerning their point (d) entitled "Surprise" Disclosure of Venetucci Conversations. (20a-23a)

The indictment in this case was filed April 4, 1973. Shortly thereafter, commencing later in April or in May, the Government informed defense counsel that there were telephone wire taps, under New York State Supreme Court (Kings County) warrants on telephones of co-defendants Cirillo and Sorrentino, and the Government commenced (pre-trial) turning over typewritten transcripts of the wire taps to defense counsel and promised to provide the wiretap logs. In all, some 90 transcripts, totalling hundreds of pages, were thus turned over to defense counsel pre-trial, together with copies of the Court wire tap orders and the application papers on which those Court orders had been issued.

On May 17, 1973 Assistant United States Attorney Heinemann told Robert A. Fried, Esq. as associate of Venetucci's counsel Jacob P. Lefkowitz, that "none of the tapes contained any conversation purported to be that of the defendant Robert Venetucci" (affirmation of Robert A. Fried in the Court below on July 17, 1973) (42a-44a). "This was confirmed when the transcripts were made available; that is, none of the transcripts (represented as "complete" 37a) furnished to defense counsel pursuant to defendant's motions (for a bill of particulars and pre-trial discovery) contained any conversation alleged to be that of the defendant Robert Venetucci" (ibid). Further, on June 12, 1973 Mr. Venetucci and counsel, after appearing before Judge Judd, went with other counsel to view the video tapes herein. After viewing the tapes counsel again asked and was informed by the Assistant United States Attorney that there were no audio tapes of Mr. Venetucci (p. 17). For further detail concerning the pre-trial aspects of this matter, see the petition for rehearing (36a-51a). This was again confirmed by Assistant United States Attorney Heinemann on the second day of the trial herein, July 10, 1973, at p. 67 of the trial minutes:

"THE COURT: Mr. Heinemann, tell me about this remark about the wiretap. Did you mean to say there are wiretaps of Venetucci?

"Mr. Heinemann: No, I don't think there is anything I said to indicate that..."

The trial herein started July 9, 1974. The Prosecutor's opening made much reference to the forthcoming wiretap evidence and outlined the intended proofs against Venetucci, saying nothing about any wiretap overhearing of Venetucci's voice (Tr. 38-47). In Venetucci's opening to the jury, Mr. Lefkowitz assured the jurors that "***no evidence whatsoever, whatsoever, will be presented in this courtroom against Robert Venetucci except jingle bells. He (the Prosecutor in his opening) mentioned half a dozen times or more about wiretap telephone conversations. Not of my client. ***" (Tr. 52).

Meanwhile, on May 24, 1973, pre-trial counsel for defendants Cirillo and Murphy moved to suppress the wiretap evidence, upon affidavits and a memorandum of law challenging the validity of the Kings County Supreme Court wiretap orders on a number of grounds. Venetucci, of course, had no standing to make any such pre-trial motion to suppress, because we were assured his voice was not on any of the tapes and the transcripts which we had been given theretofore (as well as all the subsequent transcripts we were given pre-trial) contained no conversation of Venetucci. Doubtless because of everyone's information, under the Prosecutor's assurances, that Venetucci's voice was not on any of the wiretaps, counsel for Cirillo and Murphy did not even serve us with copies of their wiretap suppression motion papers, nor did we have (nor in the circumstances were we called upon to have) anything other than a pro forma participation

in those suppression proceedings. (In fact, the first we ever saw of the Cirillo-Murphy pre-trial wiretap motion papers was on December 24, 1973 when, in preparing this appeal, we were at last able to obtain copies, after much travail.)

Judge Judd denied the Cirillo-Murphy wiretap motions in a memorandum and order filed June 27, 1973, without an evidentiary hearing.

And so, when the trial commenced on July 9, 1973, Venetucci and his trial counsel were in the position of not having challenged the wiretap orders, of not having moved to suppress the wiretap evidence, and of having represented to the jury in counsel's opening that there would be no wiretap evidence of any conversation of Venetucci. In order words, as this trial commenced, the Venetucci defense was committed to -- locked in to would be the truer description in view of the astounding aftermath -- A defense position comfortably oblivious of any inculpative wiretap evidence of Venetucci's voice.

We would respectfully emphasize the above procedural factor, that Venetucci had not, could not have, participated in pre-trial suppression proceedings.

On the fifth day of this trial, July 17, 1973, which was eight calendar days after the trial commenced (July 9) and when the stenographic minutes of the trial had consumed 794

typewritten transcript pages, the Prosecutor suddenly announced, for all the world as though it were the most casual and inimportant thing that could be pleasantly imagined, that "something else has come up" (Tr. 794), namely, that "last night***we discovered some conversations I thought would be pertinent***. It is a phone call to Sorrentino by Robert Venetucci" (Tr. 794-795). This soothingly worded brandishment of the Government's constitutionally shocking bombshell did not soothe defense counsel Lefkowitz, who instantly reacted with shock and indignation (Tr. 795-798). Strangely less unsoother, however, was the Trial Judge, whose well-known gentlemanly judicial composure prevailed even in this discomposed courtroom juncture (ibid) where, we respectfully suggest, the situation called instead for a manifestation of the instinct for appropriate judicial displeasure and vehement expression thereof. We are sure that this Court will wish to examine for itself the further ensuing record materials where the parties and the Court below waged out the unfolding controversy over the Prosecutor's all-but incredible handling of the electronic proofs in this case affecting Venetucci. See, in addition to the above cited Tr. 794-798, also Tr. 804-809, 813-814, 849-862, 868-872, 961-963, 967-975, 993, 1238-1244, 1387-1418, 1420-1423, 1431, and the Venetucci motion dated July 18, 1973 supported by the previously mentioned affirmation of same date by Robert A. Fried, Esq. (42a). The foregoing, we believe, are all of the pertinent references on the topic in question.

The final outcome in the Court below was that the Judge ruled that the belatedly discovered "Venetucci" tapes should be played for the jury (Tr. 1387-1418, 1431).

REASONS FOR GRANTING THE WRIT

1. This matter provides an opportunity for this Court to clarify the respective duties of both defense counsel and government concerning pre-trial discovery in cases involving extensive electronic proofs. That is, should defense counsel be entitled to rely on a representation by an Assistant United States Attorney, pursuant to a required pre-trial conference, that the defendant is not on audio tape or should counsel be required to listen to "3,700" hours of wiretap conversation or undertake extensive investigation in order to discover if the Assistant United States Attorney or his agents did their homework? It is conceded by the government that they inadvertently failed to disclose the existence of the alleged Venetucci conversation to counsel for petitioner until the fifth day of petitioner's trial.

The law is clear that a defendant is entitled to know whether any statements of his were seized or obtained through electronic surveillance, and the substance of such statements so the appropriate motions can be made and to avoid prejudicial surprise at trial. See Alderman v. United States, 394 U. S. 165 (1969); United States v. Crisona, 416 F 2d 107 (2nd Cir. 1969) cert. denied, 397 U. S. 961

(1970). Here petitioner, in the belief he lacked standing, did not file any such motions and was obviously prejudicially surprised at trial. It is also clear, in the Second Circuit, that failure to disclose statements of the defendant, if prejudicial, is grounds for a new trial. Concerning such failure to disclose the Second Circuit Court of Appeals has stated "We believe that noncompliance with an order to furnish a copy of a statement made by the defendant is so serious a detriment to the preparation for trial and the defense of serious criminal charges that where it is apparent, as here, that his defense strategy may have been determined by the failure to comply, there should be a new trial". United States v. Padrone, 406 F 2d 560, 561 (2d Cir. 1969). Admittedly the government's failure to disclose was not in noncompliance with a Court order. However, under current practice defense counsel meets informally with the Assistant United States Attorney and they attempt to dispose of the pre-trial motions without the necessity of having to go before the Court to obtain an order, as was done here. It is submitted that there should be no difference in the Government duty if the motions are disposed of without the necessity for a Court order. Therefore, the only question here should be whether or not petitioner was prejudiced by this failure to disclose. The prejudice inherent from the failure by the trial Court to preclude introduction of the conversations in question was so substantial and irremediable that a new trial should have been granted.

The totally effective denial to petitioner of his constitutional and statutory rights to move procedurally pre-trial against these wiretaps is sufficient, without more, to require a reversal and remand for a new trial. This is not to mention the prejudice to Venetucci of letting the jury hear the tapes after the jurors had been told by defense counsel in his opening that the Government assured us no such tapes existed (Tr. 52), and the concomitant prejudice of misleading the Venetucci defense into committing itself to a trial preparation and a trial strategy based on the assurance that no such tapes existed. Venetucci's above-mentioned motion of July 18, 1973 requested a stay or a severance for opportunity to challenge the validity of the belatedly announced wiretapes and/or to re-prepare Venetucci's trial defense in light of those wiretapes.

We are not speaking in mere constitutional abstractions divorced from the factual and decisional impingements of this trial and pre-trial record; the situation is not one of "harmless error". In the trial, what were the proofs against petitioner aside from the mid-trial "bomb-shell" wiretap proofs? Venetucci was seen peregrinating, he was seen meeting with co-defendant in January 1973. No "heroin" transaction was probatively established via the proofs of those peregrinations and meetings. Further (aside from the belated "bomb-shell" wiretap proofs allegedly containing Venetucci's own voice), there were references in the non-Venetucci wiretaps to "Bobby". We

respectfully contend that those non-direct "Bobby" items taken together with the proofs of peregrination and meetings in January 1973, would not have been enough to give the Government a case for submission to the jury much less for proof of guilt beyond a reasonable doubt. In fact, petitioner was never even seen with usual brown paper bag, necessary to cases such as these. Therefore, the "bomb-shell" wiretaps re Venetucci were crucial for the Government's prima faci case (if voice identification requirements were met, as to which see below). The alleged "direct" Venetucci tapes were therefore quite concretely necessary for the Government's conviction proofs, and as we said above, the constitutional impingements are dispositively concrete and in nowise merely abstract on this trial record.

As to the "Bobby" references on wiretaps of conversations to which Venetucci was not a party, see Tr. 558, 1399-1407, revealing that, not only was the mere name "Bobby" non-probative of alleged identification with Venetucci, but that this "Bobby" was indicatively an entirely different person, "Bob the Greek". See also Government's Exhibits 43 and 47, referring to "Bob the Greek". (Mr. Venetucci is of Italian ancestry.)

Further as to the voice identification of Venetucci on the belatedly discovered tapes (Exhibits 44 and 46) see Tr. 1387-1418; and, at Tr. 1420-1423, see how the Government, even after the tapes were played, remains so quaveringly unsure of its position on this

voice identification that the Prosecutor asked the Trial Judge for permiss ion to take belated proofs on this question, which the Court declined to allow at that late juncture. And, even after the jury verdict the Prosecutor tried to shore up his record, for appeal purposes, in regard to our contention that Robert Venetucci was not "Bobby" but that "Bobby" was instead "Bob the Greek", a different individual (Tr. 2093-2094).

2. The opinion of the Court of Appeals, was clearly and incredibly erroneous as to certain factual issues concerning the availability of wiretap logs herein, and the credibility of Mr. Lefkowitz' associate Mr. Fried which could have been easily resolved by the record (see the pre-trial minutes of June 12, 1973 at page 5, wherein Mr. Borg, attorney for co-defendant Cirillo, complains of the lack of availability of the Cirillo logs and is informed by Assistant United States Attorney Heinemann that the logs would be available within a few days). The Government's own appeal papers (where they state at p. 10 that the copies of the Sorrentino and Cirillo logs were not completed until June 15, 1973) to sworn petition for rehearing (36a , which sets forth the pre-trial sequence of events) and the affirmations of other attorneys herein, which would be made available, upon request of the Court (41a). For example, Paul E. Warburgh, Jr. of Kassner and Detsky, appeared for Mr. Gutierrez was told unequivocally by Mr. Heinemann that Mr. Gutierrez was not on the tapes. This conversation occurred during

the first week of May 1973, and prior to Mr. Heinemann's discovery conference with Jacob P. Lefkowitz' associate. It is fortunate that Gutierrez was not on the tapes, as Mr. Warburgh having relied on the assurances of the Assistant United States Attorney, and realizing he had no standing for a suppression motion did not look at the logs, which, in any event, were not "readily available" at that time (such and further affirmations are available to this Court if requested).

Therefore, in light of the above, it is beyond belief that the Court of Appeals could state, as it did, that "at least two and a half months before trial the government made the logs of the Cirillo and Sorrentino wiretaps readily available to defense counsel". This is simply not true. The time the logs actually became available (and never readily), less than one month prior to trial, counsel for Venetucci having relied upon the assurances of the Assistant United States Attorney and counsel's own investigation of the available transcripts represented as "complete" (37a) was of the justifiable opinion that petitioner had no standing for a motion to surpress and thus did not look at the logs when they did become "available". Further, the Court of Appeals stated that they doubted that Mr. Heinemann categorically conceded on May 17 that none of the tapes contained any Venetucci conversations (23a). Yet that was the substance of what occurred (36a-44a) although admittedly Mr. Heinemann did not guarantee the accuracy of his statements but there appeared to be no

reason to doubt those statements, after all he was the Assistant United States Attorney in charge of the case and he should have some idea of what his evidence concerns. Certainly, the sworn statement of a member of the bar (Mr. Lefkowitz' associate 36a-44a) should have had some small amount of credibility and at the very least, this case should have been remanded for a hearing to ascertain the correct facts.

3. Concerning the point that petitioner was convicted of conspiracy in violation of the rules against illegal proseuction for double conspiracy:

The Court charged the jury at Tr. 1951-1952 that they could find guilt on the conspiracy count only against the persons who were members of both conspiracies (the January and March 1973 conspiracies).

At Tr. 1918-1919 Venetucci's counsel moved for dismissal on the conspiracy count because of the evidence of withdrawal or termination of Venetucci's alleged participation at the January 1973 stage.

We contend that, in convicting Venetucci on the conspiracy count, the jury failed to follow the Court's instructions. The record facts cannot support such conspiracy conviction of Venetucci in light of the segregation of the January and March segments of the alleged conspiracy, as a matter of fact and as a matter of law. Cf. United States v. Borelli, 336 F 2d 376, 384-390 (2d Cir. 1964), cert. den. 379

U. S. 960.

If we are correct in the above contention, then there also become applicable the rule of United States v. Bentvena, 319 F 2d 916, 955-956 (2d Cir. 1963), cert. den. 375 U. S. 940, that is, petitioner in such event would become entitled to reversal on the two January 1973 substantive counts (counts 3 and 4).

4. Concerning Question number 3:

The Government, over defense objection, introduced testimony from an "expert" witness Garcia (Tr. 1438-1587) to "interpret" for the jury the alleged "heroin jargon" on the wiretaps.

To discuss in detail Garcia's lengthy testimony is beyond the scope of this petition; we respectfully ask the Court to examine the Garcia testimony. For, we contend that this "expert" testimony was classically violative of the rules of evidence -- and, in the setting of a criminal prosecution, of the requirements of due process -- governing the use of "expert" testimony with a view to preventing a "jury-over'awing" result or interferring with the jurors' duty and power to make "ultimate" determinations of trial fact. E. g., United States v. Ward, 169 F 2d 460 (3d Cir. 1948); Riley v. United States, 225 F 2d 558 (Dist. Col. Cir. 1958); United States v. Rosenberg, 108 F. Supp. 798 (S. D. N. Y. 1953), affd. 200 Fd 666, cert. den. 345 U. S. 965.

5. The introduction of the cocaine found on co-defendants Murphy and Cirillo at the time of their arrest on March 15, 1973 not charged in the indictment as part of any conspiracy, and certainly long after petitioner dropped out of the evidentiary picture was extremely prejudicial to this petitioner especially in light of the general public present hysterical attitude where any drugs (especially those called "narcotics") are concerned. Due to this attitude any trial Court should be especially careful to avoid such prejudice in order that defendants' due process rights to a fair trial are to be preserved in any case alleging drug involvement.

This clearly was not done here, in fact, the opposite occurred to the prejudice of petitioner's fair trial due process rights. This Court now has the opportunity to correct this situation and prevent it's occurance in the future by setting forth how a trial Court should proceed when a sensitive emotional issue such as drugs is involved.

CONCLUSION

IT IS RESPECTFULLY SUBMITTED THAT THIS PETITION FOR CERTIORARI SHOULD BE GRANTED.

Respectfully submitted

JACOB P. LEFKOWITZ
Attorney for Petitioner
Robert Venetucci

JUDGMENT AND COMMITMENT
OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-against-

ROBERT VENETUCCI
a/k/a "Bobby"

On this 19th day of October, 1973 came the attorney for the government and the defendant appeared in person and with counsel, Jacob Lefkowitz, Esq.

IT IS ADJUDGED that the defendant upon a verdict of guilty has been convicted of the offense of violating T-21, U.S.C. Sec. 841(a)(1)846 and T18, U.S.C.Sec. 2, in that on or about and between Dec. 6, 1972, and Mar. 16, 1973, both dates being approximate and inclusive, the defendant, with others, knowingly, intentionally and unlawfully did conspire to distribute and possess with intent to distribute quantities of heroin, a Schedule I narcotic drug controlled substance as charged in counts 3, 4 & 9 and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of 9 years to run concurrently on counts 3, 4 & 9 plus special parole term of 7 years. Defendant continued on bail pending appeal.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

s/ Orrin G. Judd
United States District Judge

F I L E D

U.S.D.C.
E.D.N.Y.

OCT 19 1973

ORDER AFFIRMING JUDGMENT
OF DISTRICT COURT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventh day of May one thousand nine hundred and seventy-four

Present:

HAROLD R. MEDINA
WALTER R. MANSFIELD
JAMES L. OAKES

Circuit Judges.

United States of America,
Plaintiff-Appellee

v.

Alphonse Cirillo, a/k/a "Fuzzy", Vincent Murphy, a/k/a "Murph", Salvatore Sorrentino, a/k/a "Brother", Robert Venetucci, a/k/a "Bobby", Francisco Gutierrez, a/k/a "Frankie", Theodore Alfred Lilienthal, Lawrence Cesare, a/k/a "Larry", and Abe Gaber, a/k/a "Gabe",
Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the Judgments of said District Court be and they hereby are reversed as to appellants Francisco Gutierrez and Abe Gaber, but as to all other appellants said judgments be and they hereby are affirmed.

A. DANIEL FUSARO
Clerk

BY s/ Vincent A. Cahn
Chief Deputy Clerk

OPINION OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 676, 677, 684, 688, 730, 762, 763, 796—
September Term, 1973.

(Argued February 14, 1974 Decided May 7, 1974.)

Docket Nos. 73-2426, 73-2615, 73-2554, 73-2796,
73-2555, 73-2644, 73-2645, 73-2635

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—against—

ALPHONSE CIRILLO, VINCENT MURPHY, SALVATORE SORRENTINO, ROBERT VENETUCCI, FRANCISCO GUTIERREZ, THEODORE ALFRED LILIENTHAL, LAWRENCE JOHN CESARE and ABE GABER,

Defendants-Appellants.

Before:

MEDINA, MANSFIELD and OAKES,

Circuit Judges.

Appeals from judgments entered after a jury trial in the United States District Court for the Eastern District of New York, Orrin G. Judd, *Judge,* convicting (1) all appellants of conspiracy to distribute narcotics in violation of 21 U.S.C. §846, (2) Alphonse Cirillo, Vincent Murphy, Robert Venetucci and Theodore Lilienthal of possession of narcotics with intent to distribute in violation of 21 U.S.C. §841, (3) Alphonse Cirillo, Vincent Murphy, Robert Venetucci, and Salvatore Sorrentino of attempting to distribute

narcotics in violation of 21 U.S.C. §846, (4) Alphonse Cirillo, Vincent Murphy, Salvatore Sorrentino, and Theodore Lilienthal of distribution of narcotics in violation of 21 U.S.C. §841(a)(1), and (5) Lawrence Cesare of attempting to possess narcotics in violation of 21 U.S.C. §846.

The convictions of Gutierrez and Gaber are reversed. All other convictions are affirmed.

HAROLD BORG, Esq., Kew Gardens, N.Y. (Arnold E. Wallach, Esq., of counsel), *for Appellant Cirillo.*

STEPHEN R. LAIFER, Esq., Brooklyn, N.Y., *for Appellant Murphy.*

IRVING SABLE, Esq., Far Rockaway, N.Y., *for Appellants Sorrentino and Cesare.*

JACOB P. LEFKOWITZ, Esq., New York, N.Y., *for Appellant Venetucci.*

PAUL E. WARBURGH, JR., Esq., New York, N.Y. (Kassner & Detsky, New York, N.Y., of counsel), *for Appellant Gutierrez.*

CHARLES T. MCKINNEY, Esq., New York, N.Y., *for Appellant Lilienthal.*

JULIUS WASSERSTEIN, Esq., Brooklyn, N.Y., *for Appellant Gaber.*

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MANSFIELD, *Circuit Judge:*

On this appeal we encounter a narcotic distribution conspiracy of the familiar "chain type" involving sophisticated suppliers, middlemen and customers who dealt in substantial amounts of heroin, conducting their business through use of coded narcotics trade language or jargon in which innocent phrases were used to describe heroin, prices and parties. After a jury trial before Judge Orrin G. Judd of the Eastern District of New York all appellants were found guilty of conspiracy to distribute heroin in violation of 21 U.S.C. §846 (Count 9). Additionally appellants were convicted on other counts as follows:

Counts	*Appellants*[1]
1: (possession with intent to distribute 1 kilogram of heroin)	Cirillo and Murphy
2: (distribution of the same kilogram of heroin)	Cirillo, Murphy and Sorrentino

1 Appellants were sentenced as follows:

Cirillo — 14 years, 9 months on Counts 1 and 2 (concurrent) and 10 years special parole; 10 years on Counts 7 and 9 (concurrent but consecutive to sentences on Counts 1 and 2) and 10 years special parole; $10,000 fine on Count 9.

Murphy — 10 years on Counts 1, 2, 7 and 9 (concurrent) and 7 years special parole; $5,000 fine on Count 9.

Sorrentino — 10 years on Counts 2, 7 and 9 (concurrent) and 7 years special parole; $5,000 fine on Count 9.

Venetucci — 9 years on Counts 3, 4 and 9 (concurrent) and 7 years special parole.

Lilienthal — 8 years on Counts 5, 6 and 9 (concurrent) and 5 years special parole; $2,500 fine on Count 9.

Cesare — 5 years on Counts 8 and 9 and 5 years special parole.

Gutierrez — 5 years on Count 9 and 5 years special parole.

Gaber — 5 years on Count 9 and 5 years special parole.

Presently all appellants except Cirillo are free on bail pending decision of their appeal.

Counts	*Appellants*[1]
3 and 4: (possession of the same kilogram with intent to distribute and attempted distribution)	Venetucci
5 and 6: (possession and distribution of ½ kilogram of heroin)	Lilienthal
7: (attempted distribution of the ½ kilogram)	Cirillo, Murphy and Sorrentino
8: (attempt to possess the ½ kilogram)	Cesare

Finding insufficient evidence of guilt, we reverse the convictions of appellants Gutierrez and Gaber. The convictions of all the other appellants are affirmed.

The government's proof consisted largely of tapes and transcripts of some 40 intercepted conversations occurring over the home telephones of Cirillo and Sorrentino, supplemented by testimony of surveilling agents and a video tape of a meeting of four of the conspirators. Initial authorization for the wiretap of Cirillo's phone was given in a warrant order issued on October 31, 1972, by Justice J. Irwin Shapiro of the New York State Supreme Court, Appellate Division, pursuant to New York's eavesdropping statute, N.Y.C.P.L. §§700.05, *et seq.*, after he found on the basis of affidavits submitted by the Kings County District Attorney and a state police detective, that there was probable cause to believe Cirillo was committing narcotics offenses and that evidence of these offenses could be obtained by wiretapping Cirillo's phone. This warrant was extended for four additional 30-day periods by Justice Rabin of the Appellate Division.

Initial authorization for the wiretap of Sorrentino's phone was given in a warrant issued on January 25, 1973, pursuant to the New York statute by Justice Irwin Brownstein of the New York State Supreme Court, which was extended for two additional 30-day periods.

The evidence, viewed in the light most favorable to the government, reveals the following: At 7:00 A.M. on January 18, 1973, Cirillo called Sorrentino and said he wanted to see Sorrentino and "Bobby" (Venetucci). Later that morning Sorrentino and Venetucci spent two hours at Cirillo's home in Little Neck, New York. Thereafter Sorrentino phoned Cirillo to ask whether he should "take the kid out of school" at around 4:00 P.M., to which Cirillo replied, "No, its figured most likely, like the kids going to school tonight." James Garcia, a detective with the New York City Police Department, testified, on the basis of his extensive experience in narcotics investigations, that he would interpret the "kids going to school" language as narcotics coded vocabulary for delivering narcotics.

As the result of a further phone call Cirillo, carrying a rolled up brown paper bag, a type of unobstrusive container frequently used for transportation of narcotics, and accompanied by Murphy, met at 10:30 P.M. with Sorrentino at the apartment of the latter's mother on West 8th Street where they were joined by Venetucci, who arrived at about 11:30 P.M. and left 15 minutes later. Venetucci drove directly to 120 Bay 11th Street in Brooklyn where he met appellant Frank Gutierrez on the street. Both then spent two hours in Gutierrez's apartment, following which Venetucci returned to West 8th Street and Avenue U, where he was seen arguing on the street with Sorrentino, Cirillo, and Murphy.

On the next day, January 19, a series of phone conversations between Cirillo and Sorrentino (during one of which

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"Bobby" Venetucci was present on Sorrentino's end of the wire) revealed that the argument had arisen because of Venetucci's failure to come up with the money for the narcotics that had been delivered to him the night before by Cirillo, Murphy, and Sorrentino. Venetucci had been unable to locate his "partner" who was supposed to make payment. Sorrentino reported to Cirillo that although Venetucci called from "Bay 14th" (Gutierrez's address), the money had not been received. Sorrentino assured Cirillo that he had told "Bobby" (Venetucci) that Cirillo would not take the "thing" back but wanted the agreed price of $30,000. (At that time the market price for a kilogram of 50% pure heroin ranged from $25,000 to $38,000.) In an effort to obtain the purchase price, a meeting was held that night between Cirillo, Murphy, and Sorrentino, followed by a Sorrentino-Venetucci meeting. The upshot was that while "Bobby" (Venetucci) was finally able to reach his partner "Frankie" by telephone, neither "Bobby" nor "Frankie" could produce the money. Meanwhile Sorrentino expressed concern that the "stuff" (narcotics) was still in Venetucci's house.

The efforts to obtain payment of the $30,000 price for the narcotics continued with Cirillo, the supplier, putting pressure on Sorrentino, the middleman, and the latter in turn pressing Venetucci, who supposedly was looking to his "partner" for payment. On the afternoon of January 22, Venetucci went to Grace's Discount Dress Shop on 11th Avenue in Brooklyn, owned by the wife of Gutierrez, and shortly thereafter Gutierrez entered. Two hours later Venetucci left the shop but returned within a half hour when, before reentering, he walked up and down the opposite side of the street in an apparent effort to determine whether he was being followed. Venetucci finally left the shop at 6:00 P.M. and proceeded in his automobile to Staten

Island, driving evasively when he spotted surveillance agents behind him.

By January 25, still unpaid, Cirillo and Sorrentino, who were beginning to lose their patience, resolved to give "Bobby" (Venetucci) a "good workout" and then get the "dress off him" (i.e., secure the return of the narcotics). In this they succeeded, for on the evening of January 26 Sorrentino, Murphy, and Cirillo, who was carrying a brown paper bag, all entered Sorrentino's house in Brooklyn. Three days later Venetucci was told by Sorrentino that "they got rid of it for 22" (i.e., sold the narcotics for $22,000), leaving an $8,000 balance, which Venetucci and his partner were expected to pay. Negotiations regarding the $8,000 deficit followed, with Venetucci trying to persuade Cirillo and the "other guy" to absorb half the loss on the understanding that Sorrentino and Venetucci would make up the other half. Cirillo, however, kept insisting that Sorrentino, Venetucci and "Frankie" pay the entire $8,000.

Discouraged but apparently not resolved to abandon their business relationship, Sorrentino and Cirillo, on March 9, 1973, began discussing another transaction. At 5:45 P.M. on that date Sorrentino advised Cirillo by phone that he had "met some nice people" who thought the "figure" for the "dresses" (i.e., the price for narcotics offered by Cirillo and Sorrentino) was "very good." Several days later, on March 14th, Sorrentino called Cirillo and ordered another "dress" which, according to Detective Garcia, meant another order of narcotics. At this point Cesare, the prospective purchaser, appeared on the scene and asked Sorrentino for delivery of "a sample of that dress." Upon receiving this message from Sorrentino, Cirillo went into action. He called Lilienthal's home and, upon learning that "Ted" (Lilienthal) was not expected home until 7:00 P.M., left a message instructing Ted to bring him back "those in-

come tax forms, the one . . . half filled out . . ." (i.e., a half-kilo of heroin). With a view to making the purchase Cesare, accompanied by Gaber, proceeded to the White Castle parking lot near Sorrentino's home where they waited in vain for 3½ hours for the narcotics to be supplied by Lilienthal and departed only after Sorrentino and Cirillo were unable to locate the supplier (Lilienthal).

On the following day, March 15th, Cirillo reached Lilienthal by phone and in response to his request for the "paper that I half filled out" (half-kilo of narcotics) Lilienthal indicated that he had it. Shortly thereafter Lilienthal visited Cirillo's residence, apparently for the purpose of delivering the half-kilo. Cirillo then called Sorrentino to advise that he and "Murph" would go to Sorrentino's residence. Sorrentino then told Cesare, the prospective customer for the half kilo, to call back some time after 7:30 P.M.

At 7:15 P.M. on March 15th Cirillo and Murphy, intending to rendezvous with Sorrentino for the narcotics delivery, entered the parking lot near Sorrentino's house where they were promptly arrested by federal narcotics agents and New York police. A search revealed a half kilo of heroin and small quantities of cocaine in their possession. The area was quickly cleared in order not to arouse Sorrentino's suspicions. At 8:00 P.M. Sorrentino informed Cesare by phone that he was still waiting for his "friends" (i.e., Cirillo and Murphy) to get there.

At approximately 10:00 P.M. on March 14th Cesare, the prospective customer, together with Gaber and an individual identified as Jerry Collins, arrived at Sorrentino's house. Cesare and Gaber went inside and exited with Sorrentino at 10:15 P.M. Sorrentino talked with Cesare, Gaber and Collins in the parking lot outside his house for about 45 minutes before he got in his own car and drove around for approximately a half hour. When Sorrentino returned, all four men went to a nearby restaurant

until approximately midnight when, after making a call from a nearby public telephone booth, Sorrentino went back into his residence and the other three men drove off in their car. At this point the car driven by Cesare was stopped by a narcotics agent and, when all the occupants were asked to produce identification, Gaber said that they were only in the area to see "Brother." Cesare added, "[Y]eah, Brother Salvatore Sorrentino."

In addition to the tapes and transcripts and the testimony of the surveilling agents, the government introduced the items seized from Cirillo and Murphy on the evening of March 15th, which included the brown paper bag, bag of half kilo of heroin, a small bag of cocaine taken from Cirillo, and a small amount of cocaine wrapped in tin foil that had been taken from Murphy.

On July 27, 1973, the jury returned a verdict finding all appellants guilty of conspiracy to distribute narcotics and various appellants guilty of narcotic offenses as shown above. However, Gutierrez was found not guilty of attempting to possess narcotics in connection with the January transaction and Gaber was found not guilty of attempting to possess narcotics in connection with the March transaction. We turn to the numerous claims of error asserted on this appeal.

Discussion

Use of Wiretap Evidence

Several appellants challenge the constitutionality of the New York State eavesdrop statute, N.Y.C.P.L. §§700.05, *et seq.* However, the provisions of that statute are authorized by and conform to similar provisions of the federal wiretap statute, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, see 18 U.S.C. §§2516(2), 2518 (1970), which we held to be constitutional in *United*

States v. *Tortorello*, 480 F.2d 764 (2d Cir.), *cert. denied*, 414 U.S. 866 (1973). See also *United States* v. *Giordano*, 469 F.2d 522 (4th Cir. 1972), *cert. granted*, 411 U.S. 905 (1973). For the reasons stated in *Tortorello* we reject the constitutional claim and turn to the other wiretap issues raised by appellants.

(a) *Validity of Original Wiretap Order*

The first warrant order authorizing a wiretap of Cirillo's home phone, which was issued on October 31, 1972, and broadly authorized interception until November 29, 1972, of communications of types particularly described, contained no direction that the interception should be conducted "in such a way as to minimize the interception of communications not otherwise subject to eavesdropping," as required by §700.30(7) of the statute, see N.Y.C.P.L. §700.30(7).[2] Several appellants join in Cirillo's argument that the omission of a minimization directive rendered this initial order fatally defective so that any conversations intercepted as a result of it or its subsequent extensions[3] should have been held inadmissible at trial. We disagree.

The first six paragraphs of §700.30 of the state statute limit the scope of an eavesdropping warrant by requiring it to specify, among other things (1) the name of the per-

2 Section 700.30 provides:

"An eavesdropping warrant must contain:

* * * * *

"7. A provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to eavesdropping under this article, and must terminate upon attainment of the authorized objective, or in any event in thirty days; . . . ."

3 Since the application for these extensions was based on conversations intercepted as a result of the first order, if the first order were invalid, the subsequent extensions would be "tainted" by the primary illegality.

son, if known, whose communications are to be intercepted, (2) the nature and location of the communications facilities as to which authority to intercept is granted, (3) a particular description of the type of communications sought to be intercepted, (4) a statement of the particular designated offense to which they relate, (5) the identity of the law enforcement agency authorized to intercept the communications, and (6) the period of time during which the interception is authorized. Paragraph 7 then provides that the warrant must also contain the above-quoted direction to "minimize" the intereception of non-pertinent conversations. Recognizing that paragraph 7 is essentially a summation of "the more specific requirements of 700.30(1)-(6), all of which lead to 'minimization,'" we held in *United States* v. *Manfredi*, Slip Opin. at 5593, 5611-12 (2d Cir. Nov. 23, 1973), that, when the orders and supporting affidavits are construed in "a commonsense and realistic fashion," see *United States* v. *Ventresca*, 380 U.S. 102, 108 (1965), mere omission of the "talismanic minimization language" from a wiretap order otherwise in compliance with the statute would not render the warrant invalid under state law, which governs, at least where the supporting affidavits evidenced an actual knowledge of the minimization requirement and an agreement to abide by it. See *People* v. *Solomon*, 346 N.Y.S.2d 938, 941 (Sup. Ct. 1973). While here the supporting affidavits contained no specific agreement "to limit the seizure of conversations to those specifically pertaining to the [alleged] Penal Law violations," as the affidavit did in *Manfredi*, there is other convincing evidence that the officers conducting the wiretap were aware of the minimization requirement and abided by it.

The investigation of Cirillo was conducted jointly by the District Attorney for Kings County and the Federal Bureau of Narcotics and Dangerous Drugs (BNDD). Mar-

tin Hershey, the assistant in charge of the Narcotics Bureau in the King's County District Attorney's Office who directed the investigation, Alexander Dovetko, a special agent with BNDD who supervised the federal agents engaged in the investigation, and Guy Heinemann, the Assistant United States Attorney for the Eastern District who also participated in the joint investigation, all submitted affidavits stating that they were aware of the minimization requirement before the first Cirillo warrant was obtained and that minimization instructions were given to the officers and agents conducting the tap, who were ordered to turn off all recording and listening devices whenever they were able to determine that nonpertinent conversations were being intercepted. Agent Dovetko visited the Cirillo wiretap almost daily from its inception and personally observed agents and officers complying with these instructions. Furthermore, during the period covered by the first warrant, the listening and recording of over a quarter of the completed calls was terminated as soon as nonpertinency was determined.[4] These logs, which we have reviewed, support Dovetko's conclusions.[5]

In other contexts New York appellate courts have excused purely technical defects in the form of a search warrant that has been executed according to statutory requirements. Compare *People* v. *Glen*, 30 N.Y.2d 252, 331 N.Y.S.2d 656, *cert. denied sub nom. Baker* v. *New York*, 409 U.S. 849

4 The affidavit stated that "[o]f 496 telephone calls made or received, 120 were incomplete (no answer, busy or wrong number). Approximately 287 were listened to completely and approximately 93 were listened to only initially and then turned off when it was determined that they were non-pertinent."

5 Termination for non-pertinency is indicated on the logs by the letters "N/P." Whenever these letters appear, there is no further description of the conversation in the log and the log indicates, by showing that only one or two feet of tape elapsed during that particular interception, that the recording and monitoring devices were shut off as soon as the determination of non-pertinency had been made.

(1972) (the "fact that the warrant would on its face authorize an improper search does not undo it for all purposes") with *People* v. *Varney*, 32 App. Div. 2d 181, 301 N.Y.S.2d 330 (1969) (technical defects may be overlooked where search is conducted lawfully). The omission of a minimization directive was a "technical defect" under the circumstances of this case where its absence could not, assuming proper attention to the provisions of the warrant, lead to a greater invasion of privacy than was justified by probable cause. Cf. *Smith* v. *United States*, 360 U.S. 1, 9 (1959) (deficiencies are "technical" where no substantial rights are involved). Since the first order in this case was in "substantial compliance" with the statute we hold that it was valid. Compare *Manfredi*, *supra*, with *United States* v. *Poeta*, 455 F.2d 117, 121 (2d Cir.), *cert. denied*, 406 U.S. 948 (1972) and *United States* v. *Rizzo*, Slip Opin. at 1675 (2d Cir. Feb. 7, 1974).

b) *Failure to Hold a Minimization Hearing*

Appellants next argue that the district court should not have denied their motions to suppress the wiretap evidence without first holding an evidentiary hearing to determine whether minimization had in fact been achieved during the entire course of the wiretap of the Cirillo and Sorrentino phones. In denying the motions to suppress the district court relied on the Dovetko, Hershey and Heinemann affidavits and on his own review of the logs kept during the Cirillo and Sorrentino wiretaps.

The affidavits disclose in detail a clear awareness of and adherence to the minimization requirement. The Dovetko affidavit showed further that at all times the Cirillo and Sorrentino wiretap plants were actively manned and that of the 2774 conversations initially intercepted only 1526 conversations were listened to completely, "the agents and



officers having believed at the time that the [1526] conversations were pertinent to narcotics trafficking or other criminal activity."[6] Despite the ample opportunity to review the detailed and complete logs, which were made available, and to compare them with the tapes, which were also made available, appellants made no attempt to challenge the foregoing statistics or to show that any of the conversations listened to were nonpertinent to the government's investigation. In light of this failure, we hold that the affidavits supplemented by the logs and tapes were sufficient to establish a prima facie showing of compliance with the statutory minimization directive. See *United States* v. *Rizzo*, Slip Opin. at 1491-95 (2d Cir. Jan. 17, 1974). Indeed, the prima facie showing is even stronger here than in *Rizzo*, which also upheld a wiretap conducted pursuant to the New York statute. There the state police

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6 The affidavit stated:

"Special Agent Nicholas Alleva and Special Agent William Malarney, have reviewed the logs for both the Cirillo and Sorrentino wiretaps for their entire periods of interception. They have analyzed those wiretaps to assist the Court in determining whether there was proper minimization. On the Cirillo wiretap plant, approximately 1496 telephone calls were made to or from the Cirillo telephone. Of these, 297 were incomplete (busy, no answer, or wrong number). This leaves approximately 1199 actual telephone conversations. Of these, 688 were listened to completely, the agents and officers having believed at the time that the conversations were pertinent to narcotics trafficking or other criminal activity. 511 telephone calls were initially listened to and determined to be nonpertinent whereupon they were not recorded or listened to. In some instances, some of these telephone conversations were relistened to periodically to determine that the conversations continued to be nonpertinent. On the Sorrentino wiretap plant operation, approximately 2184 telephone calls were made to or from the Sorrentino phone. Of these, 599 were incomplete (busy, no answer, or wrong number), leaving approximately 1585 actual telephone conversations. Of these, 838 were listened to completely because they were believed to be pertinent at the time. 747 were initially listened to and determined to be nonpertinent whereupon they were not recorded or listened to. In some instances, some of these telephone conversations were re-listened to to insure that they continued to be nonpertinent."

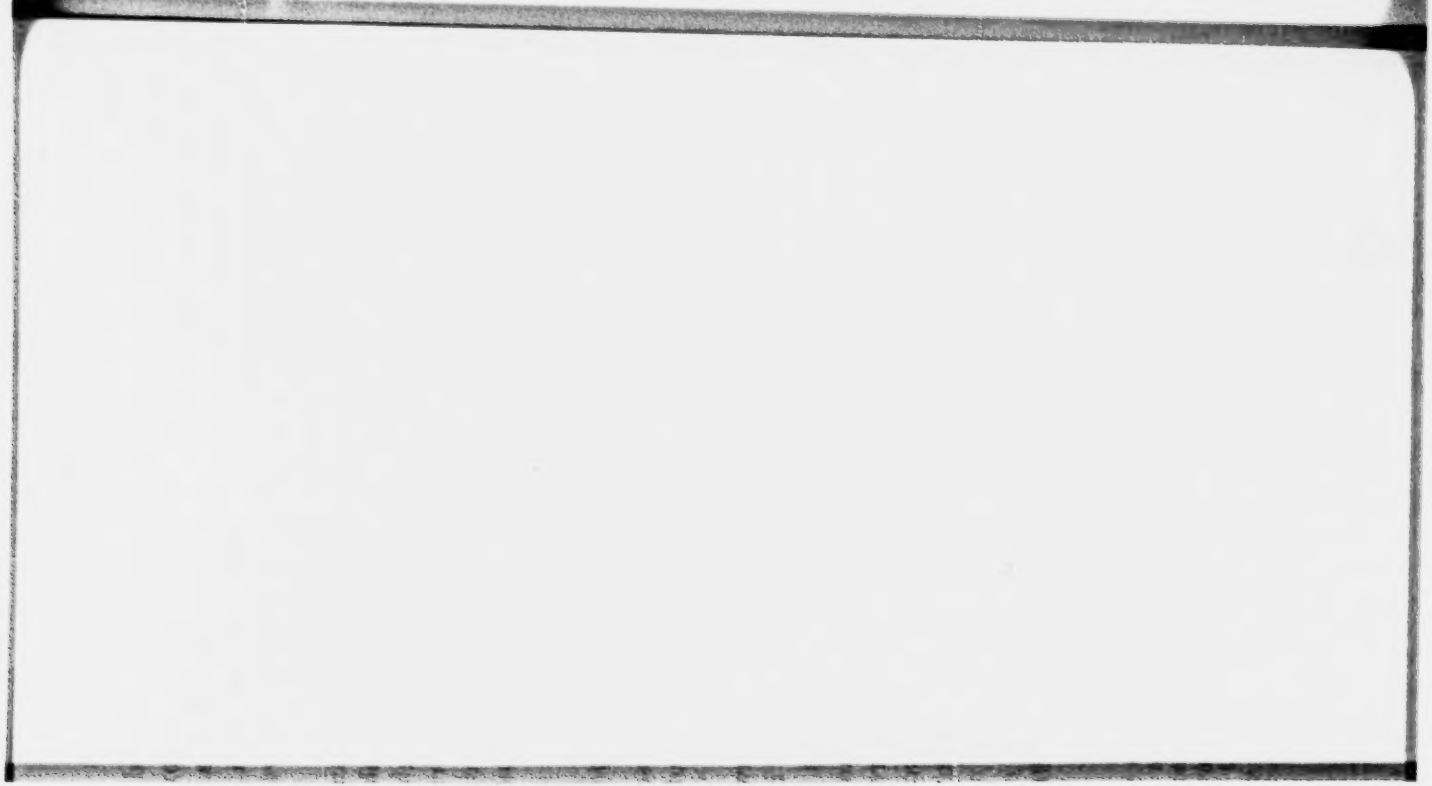
detective who supervised the wiretap merely asserted at a suppression hearing that both monitoring and recording were stopped when it had been determined that a conversation was "not pertinent." While logs had been kept, no attempt was made to present a detailed analysis of these logs, as did the Dovetko affidavit here.

The affidavits submitted to the district court, supplemented by the logs, were more than adequate to show a good faith effort to achieve minimization.[7] In the absence of any evidence that a substantial number of nonpertinent conversations had been intercepted unreasonably, the court was justified in denying appellants' suppression motions without holding a full adversary-type hearing.

(c) *"Expert" Interpretation of Narcotics Jargon*

Appellants, in the intercepted telephone conversations, never referred explicitly to heroin or narcotics but used such code words and terms as "kids out of school," "stuff," "dresses," or "half filled out income tax forms." New York City Police Detective Garcia, who had participated in over 100 narcotics investigations and had testified as an expert interpreter of narcotics jargon in five different narcotics cases, testified that in his opinion these terms were being used by appellants as disguised references to narcotics. Appellants do not object to Garcia's qualifications but argue that his interpretations should have been excluded as mere speculation or an invasion of the province of the jury. A similar argument was rejected by us in *United States* v. *Borrone-Iglar*, 468 F.2d 419, 421 (2d Cir.), *cert. denied*,

7 Even assuming *arguendo* that some of the conversations completely listened to were in fact nonpertinent, the surveillance would not necessarily have violated the minimization requirement of the statute, assuming a good faith effort had been made to achieve such minimization. Compare *United States* v. *Bynum*, 485 F.2d 490, 500-02 (2d Cir. 1973) with *United States* v. *Fino*, 478 F.2d 35 (2d Cir. 1973) and *United States* v. *Tortorello*, 480 F.2d 764 (2d Cir. 1973).



410 U.S. 927 (1972). We see no reason to depart from that holding here, particularly since the district court instructed the jury that it was not obliged to accept Garcia's interpretations and was free to draw its own conclusions concerning the meaning of the words used by appellants.

(d) *"Surprise" Disclosure of Venetucci Conversations*

Venetucci attacks the introduction at trial of two conversations between him and Sorrentino, which were intercepted shortly after the wiretap of Sorrentino's phone had begun on January 29, 1973. The basis for this objection is the failure of the prosecutor, Assistant U.S. Attorney Heinemann, to make any pretrial disclosure that these conversations had been intercepted.

Venetucci alleges that Heinemann represented to him on two occasions that none of the government's tapes or transcripts contained any conversation participated in by Venetucci. The first occasion was on May 17, 1973, when, in response to discovery motions, Heinemann agreed to furnish not only the wiretap orders with their supporting affidavits but also those transcripts of tapes that had actually been compiled, and to make all tapes and logs available for listening and inspection. Although Heinemann is alleged to have stated on that date that none of the government's tapes contained any Venetucci conversations, Heinemann did not recall having made any such statement. Before trial Heinemann, after stating that he expected all "of the conversations now intended to be used by the government in its direct case to be forwarded to defense counsel," furnished to Venetucci's counsel approximately 90 transcripts of tape recorded conversations, none of which contained any Venetucci conversations. The second occasion occurred after the trial had begun on July 9 when Venetucci's counsel moved for a mistrial on the ground that Heinemann had implied in his opening statement to

the jury that the government actually did have tapes of Venetucci's conversations which would incriminate him.[8] However, responding to the court's inquiry as to whether he meant to refer to wiretaps of Venetucci conversations, Heinemann had said "No, I don't think there is anything I said to indicate that."

Heinemann did not disclose that tapes of Venetucci conversations existed until the fifth day of appellants' trial when he informed the court that he had discovered the tapes on the previous evening in reviewing the logs kept during the Sorrentino wiretap. Heinemann subsequently offered, and the district court admitted, the transcripts and tapes of two conversations between Sorrentino and Venetucci which occurred on January 29, 1973 and on February 1, 1973, respectively, concerning their joint obligation to make up to Cirillo the $8,000 deficit resulting from the sale of the first lot of narcotics at $22,000 instead of the $30,000 which Venetucci was to pay for it. Venetucci argues that he was prejudiced by this delayed "bombshell" because (1) he was denied any opportunity to participate in a pretrial suppression motion and (2) his counsel was misled in the preparation of his own opening statement, where he emphasized that, despite the government's extensive electronic surveillance, no Venetucci conversation had been intercepted.

We agree with Venuetucci that the government should have produced the transcripts of his conversations with

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8 In moving for a mistrial, counsel for Venetucci referred to Heinemann's statement that:

> "Later it became clear exactly how much money was to be paid for the heroin that was brought to Sorrentino's mother's house that night (i.e. January 18). $30,000. And $10,000 was ultimately the payment that was demanded, Bobby Venetucci, as a sign of his good faith. This we know because the defendants talked about it on the telephone, and the telephone of Alphonse Cirillo during January, 1973, was under electronic surveillance by court order."

Sorrentino prior to trial in response to his explicit discovery requests, see *United States* v. *Crisona*, 416 F.2d 107 (2d Cir. 1969), *cert. denied*, 397 U.S. 961 (1970). However, we are persuaded that Heinemann's representations were in good faith and resulted from oversight on the government's part. We further doubt that Heinemann categorically conceded on May 17 that none of the one or two-hour reels in the government's possession, of which there were approxiately 200, contained any Venetucci conversations.

At least two and a half months before trial the government made the logs of the Cirillo and Sorrentino wiretaps readily available to defense counsel. Our review of these logs reveals that identification of each caller is neither difficult nor particularly time consuming. In each instance where a call was intercepted the log entry identified the parties (where identifiable) before giving a brief description of the conversation. Indeed, on the very third page of the Sorrentino logs there is a log entry, highlighted by two asterisks, which reads, "MO *Bobby*, MI *Brother—Bobby* and *Brother* discuss 'kilo' they took a loss on. . . ." [9] (emphasis added). All counsel were at all times aware that "Bobby" and "Brother" were the nicknames for Venetucci and Sorrentino, respectively.

Even assuming that Venetucci was misled by the government into believing that there were no tapes of his conversations—an assumption that is somewhat implausible, since he probably knew that he had talked with Sorrentino over the latter's phone—no real prejudice is shown. His claim that the delayed disclosure denied him the opportunity to make his own pretrial attack on the validity

9 "MO Bobby, MI Brother" is shorthand for Male/Out (i.e., male calling from outside) to Male/In (i.e., male inside receiving call).

of the wiretap orders or on the conduct of the wiretap operation[10] borders on the frivolous. Nothing prevented his doing so, once the transcripts were offered. Yet he failed even to ask for an adjournment or continuance. Nor did the apparent contradiction of his counsel's opening statement by the two Venetucci-Sorrentino taped conversations call for a mistrial. See *United States* v. *Allsenberrie*, 424 F.2d 1209, 1215 (7th Cir. 1970); *Pierce* v. *United States*, 414 F.2d 163, 169 (5th Cir.), *cert. denied*, 396 U.S. 960 (1969). We are not here concerned with such vital matters as a defendant's decision to take the stand, which might result in substantial and irrevocable prejudice. See *United States* v. *Padrone*, 406 F.2d 560 (2d Cir. 1969). Any possibility that the jury might believe that Venetucci's counsel deliberately tried to mislead them in his opening could have been dissipated by the court's explaining to the jury what had happened. Yet Venetucci made no request for an explanation. Under the circumstances the admission of the Venetucci transcripts was not reversible error.

Sufficiency of the Evidence

Under familiar principles, the trial court was required, before permitting the jury to consider hearsay declarations of one alleged conspirator as evidence against his alleged co-conspirator, to find by a fair preponderance of *non*-hearsay evidence that the latter was a party to the conspiracy. See *Glasser* v. *United States*, 315 U.S. 60, 74

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10 Venetucci asserts that his arguments against the wiretap would have been entirely different from those actually raised by the other defendants. He says he would have focused on the New York rather than the federal legislation (although the New York legislation was clearly authorized and conformed to the federal legislation), on the existence of probable cause for the first order (rather than its form) and the numerous extensions of the first order. We have considered these arguments but find them insufficient to change our already-expressed views.

(1942); *United States* v. *Geaney*, 417 F.2d 1116 (2d Cir.), *cert. denied sub nom. Lynch* v. *United States*, 397 U.S. 1028 (1969). Otherwise, a defendant could be convicted solely on the basis of hearsay evidence which he had had no opportunity to impeach or refute. See *Flintkote Co.* v. *Lysfjord*, 246 F.2d 368, 387 (9th Cir.), *cert. denied*, 355 U.S. 835 (1957). While the government's non-hearsay evidence against an alleged co-conspirator may be entirely circumstantial, see *United States* v. *Garguilo*, 310 F.2d 249, 253 (2d Cir. 1962), mere association with persons engaged in a criminal enterprise or even presence at the scene of their crime will ordinarily not be enough. There must be some basis for inferring that the defendant knew about the enterprise and intended to participate in it or to make it succeed. Compare *United States* v. *Cimino*, 321 F.2d 509 (2d Cir. 1963), *cert. denied*, 375 U.S. 974 (1964) ("mere meeting was no evidence [that persons were] conspirators") and *United States* v. *Fantuzzi*, 463 F.2d 683 (2d Cir. 1972) with *United States* v. *Cassino*, 467 F.2d 610 (2d Cir. 1972), *cert. denied*, 410 U.S. 913 (1973).

As to most defendants this threshold requirement as to admissibility of hearsay declarations of co-conspirators was clearly met. The tapes, transcripts, surveillance, and other circumstantial evidence provided overwhelming non-hearsay evidence of a conspiracy to distribute heroin in which Cirillo and Murphy were suppliers. Sorrentino was a middleman, and Venetucci and Cesare were customers. Lilienthal, Gutierrez and Gaber argue, however, that there was insufficient non-hearsay evidence to permit the trial court to find by a fair preponderance of the evidence, which is the governing standard, that they had intended to participate in either the January or March transactions. Therefore, they say, it was reversible error to permit the jury to consider the incriminating hearsay declarations of the other co-defendants as evidence against them.

(a) *Lilienthal*

The non-hearsay evidence of Lilienthal's participation in the March transaction was clearly sufficient to permit the introduction of statements by co-conspirators in furtherance of the conspiracy. The principal item was Lilienthal's devastatingly incriminatory telephone conversation with Cirillo on March 15 in which Cirillo asked "I got to—I got to have it before the income tax is filled out. You got the paper that I half filled out?" (i.e., have you got the half kilo of heroin?), to which Lilienthal responded "Oh yeah, yeah, yeah," and advised Cirillo that he would stop by in about an hour. In a short while Lilienthal left his residence and later in the day his car was seen at Cirillo's house. Shortly after Lilienthal's visit to Cirillo's house, Cirillo and Murphy went to the White Castle parking lot near Sorrentino's house where they had failed to appear on the previous night because Cirillo had been unable to communicate to Lilienthal his request for those "half filled out" income tax forms (i.e., the half kilo of heroin). When they arrived at the parking lot Cirillo and Murphy were arrested and a package containing a half kilo of heroin was discovered on Cirillo.

From this non-hearsay evidence, including Lilienthal's own statements and conduct, the jury could infer that he agreed to and did supply to Cirillo the half kilo of heroin needed for sale in the chain of distribution. The court acted properly, therefore, in admitting hearsay statements of co-conspirators made in furtherance of the conspiracy, including Cirillo's "statement to Sorrentino" during the aborted January transaction that "Teddy" (Lilienthal) was a supplier who was always a "million percent, nothing ever goes wrong" and another statement by Cirillo to Sorrentino before the March transaction to the effect that "my friend Ted [has] got some papers for you," (i.e., some heroin).

These statements confirmed the non-hearsay evidence surrounding the meeting and warranted the jury's finding beyond a reasonable doubt that Lilienthal was a member of the conspiracy and a participant in the March transaction. See *United States* v. *Manfredi*, —— F.2d —— (2d Cir. Nov. 23, 1973), Slip Opin. 5593; *United States* v. *Ruiz*, 477 F.2d 918 (2d Cir. 1973); *United States* v. *Calabro*, 449 F.2d 885 (2d Cir. 1971), *cert. denied*, 405 U.S. 928 (1972).

(b) *Gutierrez*

Unlike Lilienthal, Gutierrez was never heard to discuss narcotics with any of the conspirators. The only independent non-hearsay evidence of Gutierrez's possible participation in the conspiracy related to the aborted January, 1973, transaction. On January 18th Venetucci, immediately after leaving his rendezvous with Cirillo, Murphy and Sorrentino at Sorrentino's mother's apartment, for two hours visited Gutierrez's home. At the conclusion of that meeting Venetucci drove back to rejoin Cirillo, Murphy and Sorrentino. On January 22nd Venetucci visited with Gutierrez for four hours at the dress store of the latter's wife, with an interruption when Venetucci left and then returned only after checking for surveillance. Venetucci finally departed, driving evasively to Staten Island. There was no evidence whatsoever of what was discussed and of what transpired at these meetings, or of any possession of narcotics by Gutierrez. Nor was there any non-hearsay evidence of any participation by him in any purchase or sale. Clearly this proof was insufficient to permit the court to find by a fair preponderance that he had participated.

While the two visits raise suspicion, suspicion is not enough. For all we know Venetucci may have visited Gutierrez in an unsuccessful effort to induce him to become

a member of the conspiracy. Possibly he was visiting him in an unsuccessful effort to borrow the money he needed in order to fulfill his unlawful commitment to Sorrentino and Cirillo. Absent some proof of knowing participation by Gutierrez in the unlawful venture we can conceive of any number of perfectly legitimate conversations or transactions that might have been the subject of the visits. Relying on *United States* v. *Manfredi, supra,* the government contends that in addition to Venetucci's visits there was circumstantial evidence in the form of "verbal acts" by Sorrentino that showed Gutierrez's participation in the conspiracy. It is true that in several Sorrentino-Cirillo telephone conversations Sorrentino referred to "Frankie" Venetucci's "partner." But these statements were clearly hearsay as to Gutierrez, who was not a party to the conversations and had no opportunity to cross-examine the declarant. They were therefore inadmissible against him in the absence of non-hearsay proof of his conscious participation in the conspiracy. To involve Gutierrez by reason of these references would be to sanction a finding of guilt on the basis of nothing more than association, which is impermissible. Hearsay cannot be used as a supplement to, much less as a substitute for, insufficient non-hearsay proof.

Although *Manfredi* went quite far in admitting "verbal acts" of a co-conspirator, it is clearly distinguishable from the present case and cannot be expanded to admit Sorrentino's hearsay statements. In *Manfredi* the statements were those of the defendant Joseph LaCosa regarding *his own personal relations* with Manfredi as a narcotics supplier and could be coupled with his own evasive personal conduct upon the occasion of his visits to Manfredi's home. We treated LaCosa's statements as circumstantial evidence because they represented the declarant's *personal knowledge.* When added to the other corroboratory cir-

cumstances we concluded that they had a "ring of reliability." Compare *Manfredi* with *United States* v. *D'Amato*, —— F.2d —— (2d Cir. March 14, 1974), Slip Opin. 2199, 2205-08. No such "ring of reliability" exists here. In the first place the statements relied upon by the government are not those of Venetucci with respect to his personal dealings with Gutierrez, which might conceivably fit within *Manfredi*, but statements of Sorrentino, who had no personal relationship at all with Gutierrez. For all we know Sorrentino may have been basing his description of Gutierrez as Venetucci's "partner" on rumors that he had heard from persons other than Venetucci. To admit such rank "double hearsay" as "circumstantial evidence" or "verbal acts" would be to make a mockery of the "non-hearsay" threshold requirement.

The danger inherent in permitting such hearsay to be used as the basis for admitting still more hearsay declarations of co-conspirators is rather obvious. Aside from the lack of opportunity to cross-examine the declarant and the obvious second-hand nature of Sorrentino's statements, out-of-court statements by Venetucci himself were introduced which suggested that Gutierrez had not agreed to participate in the narcotics scheme. Thus, in a conversation with Sorrentino on February 1, 1973, with respect to obtaining a loan to make up the $8,000 deficit in the price ultimately secured by Cirillo for the narcotics which Venetucci had agreed to buy, Venetucci expressly denied any understanding that "Frankie" was to share in payment of the deficit.

It may be that the "non-hearsay" threshold requirement for admission of hearsay declarations of co-conspirators, which had been liberalized through a series of modifications since its inception, compare *United States* v. *Nardone*, 127 F.2d 521, 523 (2d Cir.), *cert. denied*, 316 U.S. 698 (1942), and *United States* v. *Pugliese*, 153 F.2d 497,

500 (2d Cir. 1945), with *United States* v. *Geaney, supra,* will be relaxed even further to permit introduction of certain statements of co-conspirators regardless of their unavailability for cross-examination, subject to conditions that will be deemed sufficient to guarantee their trustworthiness. See Proposed Rules of Evidence for the United States District Courts and Magistrates, Rules 803(1)-(2). Until such a change is made, however, we must adhere to the standing rule which requires us to exclude hearsay where the threshold test has not been made.

Since the proof of Sorrentino's statements as to the reasons for Venetucci's visit to Gutierrez was inadmissible as evidence of Gutierrez's participation, the trial court could not properly consider it in applying the "fair preponderance" test with respect to Gutierrez. Cf. *Dutton* v. *Evans,* 400 U.S. 74, 88 (1970); *General Tire of Miami Beach, Inc.* v. *NLRB,* 332 F.2d 58, 61 (5th Cir. 1964). In light of the government's failure to adduce any non-hearsay evidence that Gutierrez was aware of the narcotics transaction, we are constrained to hold that it proved no more than mere association between Gutierrez and Venetucci, which cannot be the basis for an inference of guilt. See *United States* v. *Fantuzzi,* 463 F.2d 683, 689-90 (2d Cir. 1972); *United States* v. *Cimino,* 321 F.2d 509-10 (2d Cir. 1963), *cert. denied,* 375 U.S. 974 (1964); *United States* v. *Bentvena,* 319 F.2d 916, 949 (2d Cir.), *cert. denied,* 375 U.S. 940 (1963); *United States* v. *Stromberg,* 268 F.2d 256, 267 (2d Cir.), *cert. denied sub nom. Lassa* v. *United States,* 361 U.S. 863 (1959). See also *United States* v. *Glover,* 306 F.2d 594 (10th Cir. 1962).

(c) *Gaber*

The non-hearsay evidence of Gaber's participation in the March transaction was even less persuasive than that with respect to Gutierrez. It consisted only of (1) Gaber's

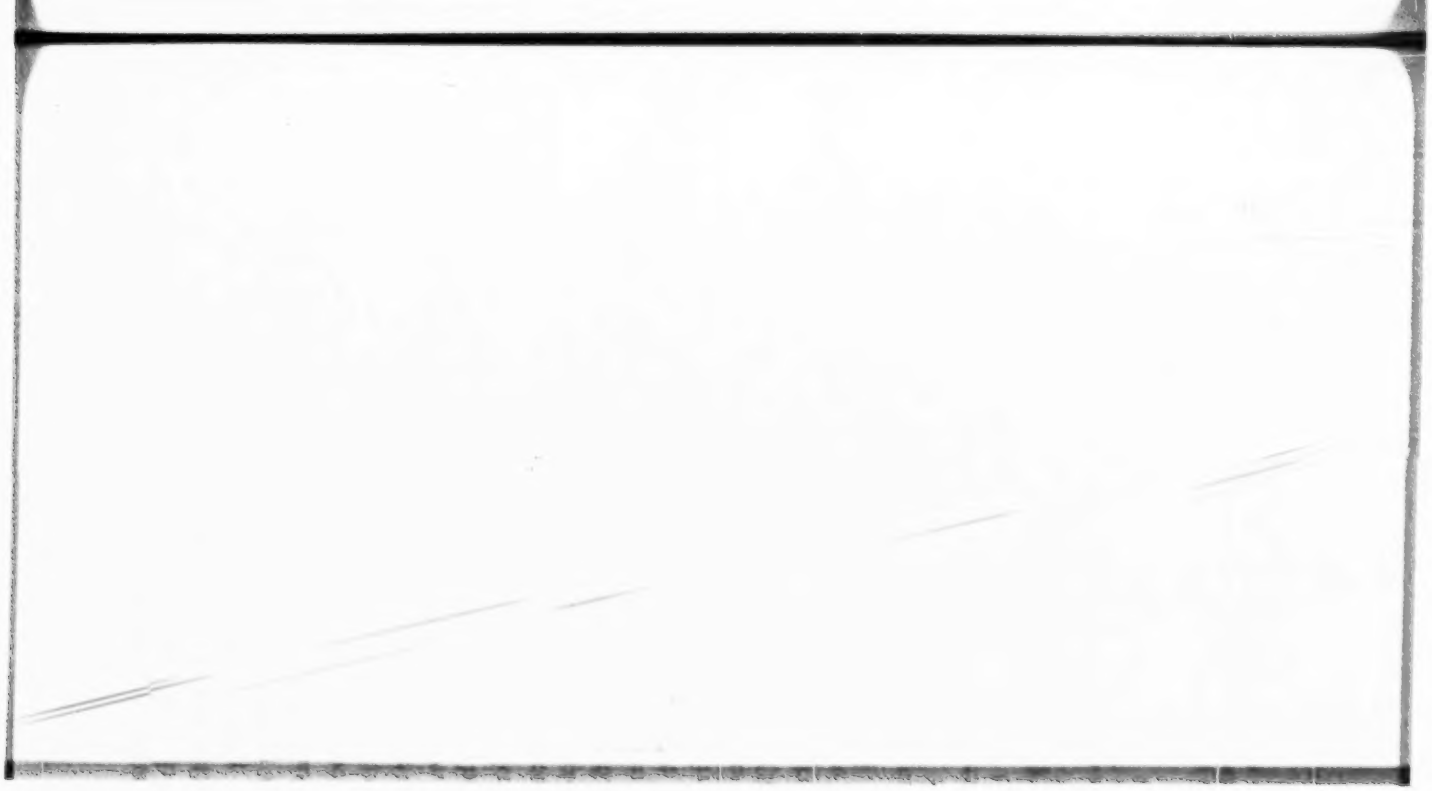
presence with Cesare in the White Castle parking lot on the evening of March 14, (2) his presence there again on the evening of March 15 when Cesare met with Sorrentino, and (3) Gaber's statement later that evening when he and Cesare were stopped by police that he was in the neighborhood to see "Brother" Sorrentino. There was no showing that narcotics were ever discussed in Gaber's presence, Gaber did not act furtively or lie to the police when questioned. Nor did he commit any act suggesting that his association with Cesare was illicit in nature. Mere presence at a site where a narcotics sale has been planned, without some showing that the defendant knew of it, is not enough to satisfy the "fair preponderance" test.[11] See *United States* v. *Fantuzzi, supra; United States* v. *Cimino, supra,* and other decisions cited on page 3316.

The decisions relied upon by the government do not support its argument that there was sufficient non-hearsay evidence of Gaber's membership in the conspiracy to admit the hearsay declarations of alleged co-conspirators. In *United States* v. *Calabro*, 449 F.2d 885 (2d Cir.), *cert. denied*, 404 U.S. 1047 (1971), in affirming a narcotics conviction, we regarded "of critical importance" the fact that the defendant, who had been present at several meetings between the seller and the intended customer, an undercover agent, carefully scrutinized the agent and at one point actually frisked him.[12] And in *United States* v. *Ragland*, 375 F.2d 471, 473 (2d Cir. 1967), we upheld the admission of hearsay evidence against a defendant only after noting

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11 Cesare's statement in one of his March 14 telephone conversations with Sorrentino to the effect that he (Cesare) had "Gabe" (Gaber) with him added nothing to the government's proof of guilty knowledge on the part of Gaber.

12 It was not actually clear from the evidence that the defendant himself frisked the undercover agent. The frisking occurred when the agent was standing at the urinal in a restaurant's men's room as the defendant and his colleague passed behind him.



that a co-defendant had not only used the "slanguage" of narcotics dealings *in the defendant's presence* but had also explicitly referred to "narcotics." Compare *Calabro* and *Ragland* with *Ong Way Jong* v. *United States*, 245 F.2d 392 (9th Cir. 1957) (conviction reversed although defendant was constantly with co-defendant who sold narcotics): *Glover* v. *United States*, 306 F.2d 594 (10th Cir. 1962) (conviction reversed although defendant seen in vicinity of narcotics transaction between co-defendant and undercover agent) and *People* v. *Garcia*, 201 Cal. App. 2d 589, 20 Cal. Reptr. 242 (1962) (conviction reversed although defendant present at time of narcotics sale).

Since the government failed to adduce sufficient non-hearsay evidence of Gaber's participation in the conspiracy, his conviction must be reversed.

Variance Between Proof and Indictment

Venetucci, Lilienthal and Cesare[13] advance the argument, frequently asserted in conspiracy cases, see *United States* v. *Borelli*, 336 F.2d 376, 380 (2d Cir. 1964), *cert. denied sub nom. Cinquegrano* v. *United States*, 379 U.S. 960 (1965), that even assuming the involvement of each in one of the two transactions, the evidence showed two independent conspiracies, one in January and the other in March, 1973, rather than the single on-going conspiracy alleged. The issue turns on whether the proof warranted an inference that each of the three, in dealing with a member of the core group (Cirillo, Murphy and Sorrentino), was aware of, and thus knowingly furthered, the core group's overall on-going venture or partnership. See *Borelli*, *supra* at 385. Although a single transaction with, or function performed

13 Gutierrez and Gaber also complain of a variance as to them but we need not consider these claims since we have already concluded that the evidence was insufficient to connect them with either the January or March transaction.

for, a representative of the core group may under some circumstances be insufficient to warrant an inference of knowledge of the extensive nature of the core group's activities, see *United States* v. *DeNoia*, 451 F.2d 979 (2d Cir. 1971); *United States* v. *Aviles*, 274 F.2d 179, 189-90 (2d Cir.), *cert. denied*, 362 U.S. 974 (1960); *United States* v. *Stromberg*, 268 F.2d 256, 267 (2d Cir.), *cert. denied*, 361 U.S. 863 (1959), we have recognized that it is "not an arbitrary rule which is to be applied rigidly and without reason." See *United States* v. *Agueci*, 310 F.2d 817 (2d Cir. 1962), *cert. denied*, 372 U.S. 959 (1963). Indeed, just recently we said that "it would be unrealistic to assume that major producers, importers, wholesalers or retailers do not know that their actions are inextricably linked to a large on-going plan or conspiracy." *United States* v. *Arroyo*, —— F.2d —— (2d Cir. Mar. 22, 1974), Slip Opin. 2314-15.

We are not here confronted, however, with merely a single delivery or purchase on the part of each of these three appellants (Venetucci, Lilienthal and Cesare) which, without more, might not support knowledge of a broader conspiracy, see, e.g., *United States* v. *DeNoia*, *supra*, but with deeper involvement on the part of each of these participants. Venetucci met on at least two occasions with all three members of the core group, took delivery of one kilogram of heroin and, when he and his partner were unable to make payment, redelivered the kilo and was informed that the core group had resold it elsewhere at an $8,000 loss, following which negotiations were conducted regarding payment of the deficit. From all of these circumstances—the large quantity, the number of meetings and his knowledge of the resale—the jury was entitled to infer that as a major retailer Venetucci knew that he was participating in a larger on-going venture. See *United States* v. *Arroyo*, —— F.2d —— (2d Cir. Mar. 22, 1974), Slip Opin. 2314-15.

In the cases of Lilienthal and Cesare the evidence shows, in addition to their participation in a transaction involving a large quantity, that they used narcotics code language in their dealings, Lilienthal making a delivery of a half kilo in response to Cirillo's request for "half-filled out" income tax papers and Cesare negotiating for the "sample of the dress." From these circumstances, including their use of pre-arranged code language, the jury could infer knowledge that they were participating in a continuing major business which extended in scope beyond the particular transaction and depended for its success upon a chain of distribution in which each principal played an essential part. *United States* v. *Bynum*, 485 F.2d 490, 495-96 (2d Cir. 1973); *United States* v. *Miller*, 381 F.2d 529, 533 (2d Cir. 1967).

Even assuming there was a variance between the government's proof and the indictment, we are directed to no specific prejudice resulting from the variance and we are convinced that there could have been none. Unlike *Kotteakos* v. *United States*, 328 U.S. 750 (1945), which involved 36 alleged co-conspirators and some 8 separate conspiracies to defraud the government in relation to FHA loans, here there were only 8 alleged co-conspirators and at most two separate conspiracies each of which was proved beyond a reasonable doubt by evidence relating only to it. Moreover, the trial court cautioned the jury that "[w]hether or not a defendant was a member of a conspiracy must be determined on the evidence . . . as to his own actions, his own conduct, his own statements and declarations, his own connection with the acts, and conduct of the other alleged co-conspirators." In *Blumenthal* v. *United States*, 332 U.S. 539, 560 (1947), which, like this case, involved a relatively small number of alleged co-conspirators and conspiracies, the Court found that a sim-

ilar instruction had reduced the risk of an impermissible transfer of guilt to a minimum.

Miscellaneous Other Points

(a) *The Contents of the Paper Bag*

Sorrentino argues that his conviction on Count 2 (distribution of one kilogram of heroin on January 18, 1973) must be reversed since the government offered no direct proof that the paper bag carried by Cirillo to the meeting with Murphy, Sorrentino and Venetucci at Sorrentino's mother's apartment on the evening of January 18 contained heroin. We disagree. There was ample circumstantial evidence that the bag contained heroin. The delivery of the bag was the result of Sorrentino-Cirillo telephone negotiations in narcotics jargon and was followed by angry discussions regarding Venetucci's failure to deliver the "thirty," (e.g., $30,000), the approximate going price for a 50% pure kilogram of heroin. Later Cirillo and Sorrentino agreed to get the "dress" (i.e., narcotics) off Venetucci.

(b) *The Introduction of the Cocaine Found on Murphy and Cirillo*

Appellants Murphy and Cirillo argue that the trial court should not have permitted the government to introduce the small quantities of cocaine found on them at the time of their arrest (in addition to the half kilogram of heroin found on Cirillo) since it was evidence of crimes other than those charged in the indictment. But here the cocaine was relevant to refute the position which the government could anticipate and which counsel for Cirillo actually tried to establish during cross-examination of government witnesses, i.e., that the heroin was planted on Cirillo as a frame-up by the arresting officers. See *United States* v. *Purin*, 486 F.2d 1363, 1367 (2d Cir. 1973); *United States* v.

Wright, 466 F.2d 1256, 1258-59 (2d Cir. 1972), *cert. denied*, 410 U.S. 916 (1973). In any event admission of the cocaine as evidence of guilty knowledge on the part of Cirillo and Murphy was well within the trial court's wide discretion. See *United States* v. *Deaton*, 381 F.2d 114, 117-19 (2d Cir. 1967).

(c) *The Jury Charge*

During his charge to the jury the trial judge instructed that they should consider the wiretap evidence since he had determined that the wiretap orders were properly issued. "If I am wrong," he continued, "somebody else can reverse me, but you are bound to take my view of the law." Appellants Murphy and Cirillo argue that this statement, to which they excepted, impermissibly tended to establish a similar train of thought in the minds of the jurors—i.e., if they should render an erroneous verdict, someone else would reverse them. The unnecessary remark is confusing and conceivably could be interpreted several ways. However, even accepting the interpretation given to it by appellants, we are satisfied that under the circumstances of this case it was clearly harmless, in view of the overwhelming evidence against Murphy and Cirillo, including the tapes, visual surveillance and arrest with a large quantity of narcotics in their possession.

Conclusion

The convictions of appellants Gutierrez and Gaber are reversed. All other convictions are affirmed.

PETITION FOR REHEARING

IN THE UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

No. 73-2426 September Term, 1973

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

ROBERT VENETUCCI, et al,

Defendants-Appellants.

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT:

Robert Venetucci, the defendant-appellant abovenamed, by Robert A. Fried, Esq. of the office of Jacob P. Lefkowitz, Esq., presents this, his petition for a rehearing in the above-entitled cause, and, in support thereof, respectfully shows:

I

It is simply not true that as this Court states "at least two and a half months before trial the government made the logs of the Cirillo and Sorrentino wiretaps readily available to defense counsel" (p. 3314). The correct sequence of events, insofar as concerns Mr. Venetucci, is as follows:

1. On May 17, at 2:10 p.m., I first ment with Mr. Guy L. Heinemann, Assistant United States Attorney, at his office for

the purposes of pre-trial discovery (see affirmation of Robert A. Fried, dated July 17, 1973, in support of defendant's oral motion to preclude, attached hereto as Exhibit 'A'). In addition to the representations made (as detailed in Exhibit 'A') counsel was also informed that the logs, though not available at that time, would be sent to counsel as they became available. Further, counsel was also informed that the wiretap orders and affidavits in support had already been mailed to this office. However, after several days and several phone calls to Mr. Heinemann's secretary, as of May 29, 1973 the material had not yet arrived.

2. Finally, subsequent to May 29, 1973, and on or about June 5, 1973, this office received copies of all wiretap orders, applications and affidavits, and copies of transcripts of ninety conversations (all the conversations that had been represented as "pertinent" and which the government intended for use at trial). Accompanying these materials was a letter by Mr. Heinemann, dated May 29, 1973, attached hereto as Exhibit 'B'. This letter indicated that copies of the logs of the wiretap interceptions "will be provided to assist counsel". Thus, it is clear that as of the above dates, the copies of the logs had not yet been provided, as had been promised earlier.

3. On or about June 12, 1973, Mr. Venetucci and I (in addition to other counsel) were present at the United States Courthouse for the Eastern District in order to meet with Mr. Heinemann and to view the video tapes (referred to in Exhibit 'B'). At that time it was expected

that copies of the logs were to be provided to defense counsel. However, as is stated in the Brief for the appellee at p. 10, the copies of the Sorrentino and Cirillo logs were not completed until June 15, 1973.

4. Several days subsequent to June 15, 1973, this office received copies of two letters from Mr. Heinemann, dated June 15, 1973, to Harold Borg, Esq. (attached hereto as Exhibit 'C') and to the Hon. Orrin G. Judd, respectively (attached hereto as Exhibit 'D'). The letter to Mr. Borg states that a copy of the Cirillo wiretap log is enclosed and that "Happily this time the Xerox reproduction was quite good. Only a few pages appear beyond legibility". Insofar as this office is aware, no copies of any other logs were sent to any other defense counsel; however, I do believe that Arnold E. Wallach picked up a copy of the Sorrentino logs sometime during the June 12 to June 20th time period. (This belief is based upon a telephonic communication I had with Mr. Wallach on or about May 20, 1974 in preparing this petition.)

5. It is clear from the above that the logs herein were not readily available to defense counsel "two and a half months before trial". In fact, they were never "readily" available, and in any enent, they were certainly not available to counsel for Venetucci until long after they would have been needed for a suppression motion based upon minimization. Further, this Court is already aware that such motion was not contemplated because based upon the representations of Mr. Heinemann and counsel's study of the transcripts herein, it was clear that Mr. Venetucci had no standing to make such motion (see also II, infra).

6. It is curious that neither Mr. Heinemann, who had easy access to the logs in preparing his reply to the suppression motions of the other counsel herein, nor the trial court which received the logs (see Exhibit 'D') in order to decide those motions never discovered the entry concerning "Bobby" (a common nickname for all Roberts).

II

While it appears that there is some doubt in the mind of this Court as to whether or not Mr. Heinemann "categorically conceded on May 17 that none of the one or two-hour reels in the government's possession, of which there were approximately 200, contained any Venetucci conversations", there is no doubt in my mind that Venetucci's non-appearance on those tapes was made clear to me, not only on May 17, but subsequently (see Exhibit 'A'). While it is admitted that Mr. Heinemann did not state, "I absolutely, unequivocally guarantee that your client's conversations are not to be found in any of the tapes", I now state, for the record, that at no time was I informed by the Assistant United States Attorney that he began this case with minimal preparation and was not totally familiar with the evidence herein (see Brief for the appellee, pp. 27 and 28) or given any constructive notice in any manner whatsoever that was not positive as to his statements and that I had better listen to the tapes themselves in order to discover whether he may have missed something pertaining to Mr. Venetucci. If Mr. Heinemann had stated that he was uncertain or that he had not completely reviewed his own material the situation might have been different.

However, under the circumstances herein, it is incredible to require any attorney to listen to "3,700" hours (the government's figure, see note ** p. 27 Brief for the appellee) of wiretap conversation, after having been informed his client's conversations were not contained therein, in order to discover if the Assistant United States Attorney or his agents did their homework,especially without any notice from the Assistant United States Attorney to that effect.

III

Certainly, the delayed disclosure of the wiretap conversation, occurring after defendant's counsel assured the jury that the defendant was not to be found on the tapes("no evidence whatsoever, whatsoever, will be presented against Robert Venetucci except jingle bells. He (the prosecutor in his opening) mentioned half a dozen times or more about wiretap telephone conversations. Not of my client." (Tr. 52)) could affect the vital decision on the part of a defendant whether or not to take the stand where that defendant's own voice could be a contradiction of his counsel's opening statement.

Further, one fails to see in what manner an instruction could have been phrased in order to cure the "apparent contradiction" in counsel's opening statement that would not have further prejudiced this issue; especially as it is clear that up until that point, the only information connecting Mr. Venetucci with this matter was that his name was Robert (however, the transcripts spoke of a Bobby the Greek and Mr. Venetucci is of Italian ancestry) and he was acquainted with some of the other defendants.

WHEREFORE, upon the foregoing grounds, it is respectfully urged that this petition for rehearing be granted and that the judgment of the District Court be, upon further consideration, reversed.

s/
ROBERT A. FRIED for
Jacob P. Lefkowitz, Attorney
for Petitioner and Defendant-
Appellant Robert Venetucci

I, Robert Aron Fried, an attorney associated with Jacob P. Lefkowitz, attorney for Robert Venetucci, do hereby certify: 1) that the foregoing petition is true, except as to those matters stated to be upon information and belief and as to those matters I believe the statements to be true. 2) I have been informed, in conversations with the other attorneys herein having knowledge of the above facts, that the facts herein contained contained can be further verified, if required, by affidavits from those attorneys, and 3) That the foregoing petition for a rehearing of this cause is presented in good faith and not for the purpose of delay.

Dated: New York, New York
May 20, 1974

s/
ROBERT A. FRIED



EXHIBIT A - AFFIRMATION DATED JULY 17, 1973
ANNEXED TO PETITION FOR REHEARING

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-against-

ALPHONSE CIRILLO, VINCENT MURPHY, SALVATORE SORRENTINO, ROBERT VENETUCCI, FRANCISCO GUTIERREZ, THEODORE ALFRED LILLINETHAL, LAWRENCE JOHN CESARE and ABE GABER,

Defendants.

ROBERT A. FRIED, an attorney duly admitted to practice before this Court, affirms the following to be true under the penalties of perjury:

I am an attorney-at-law associated with JACOB P. LEFKOWITZ, attorney for defendant ROBERT VENETUCCI. On May 16, 1973, I served upon the United States Attorney's Office a copy and filed with this Court certain pre-trial motions for discovery and inspection and for a bill of particulars. Pursuant to the rules of this Court, this affirmant on May 17, 1973, met with Assistant United States Attorney Guy L. Heinemann at his office located at the Federal Building, Cadman Plaza East, Brooklyn, New York concerning the above-mentioned pre-trial motions. At this conference I was informed, pursuant to Numbers 1(a), 3(a)(b), and (c) and 4(p)

and (q) of said motions that the Government had obtained information relevant to the instant prosecution by the use of Court authorized wiretaps and that defense counsel would be furnished with the court order, the logs of such interceptions and transcripts of all the conversations that the government intended to use in this matter. In addition, the tapes of such interceptions were available for listening and/or duplicating (see attached letter "Exhibit A" in confirmation). I was further informed that none of the tapes contained any conversation purported to be that of the defendant Robert Venetucci. This was confirmed when the transcripts were made available; that is, none of the transcripts furnished to defense counsel pursuant to defendant's motions contained any conversation alleged to be that of the defendant Robert Venetucci. This was again confirmed by Assistant United States Attorney Heinemann on July 10, 1973 at p. 67 of the trial minutes:

"THE COURT: Mr. Heinemann, tell me about this remark about the wiretap. Did you mean to say there are wiretaps of Venetucci?

Mr. Heinemann: No, I don't think there is anything I said to indicate that..."

A defendant is entitled to know whether any statements of his were seized or obtained through electronic surveillance, and the substance of such statements so the appropriate motions can be made and to avoid prejudicial surprise at trial. This was not done here. Accordingly, defendant requests that such conversation be precluded.

Legal support for the oral motion to preclude is set forth in the accompanying memorandum of law.

Dated: New York, New York
July 17, 1973

s/
ROBERT A. FRIED

EXHIBIT B - LETTER DATED MAY 29, 1973
ANNEXED TO PETITION FOR REHEARING

United States Department of Justice

UNITED STATES ATTORNEY
Eastern District of New York
Federal Building
Brooklyn, N.Y. 11201

SPECIAL DELIVERY

May 29, 1973

Jacob Lefkowitz
150 Broadway, Suite 1401
New York, N.Y. 10038

Re: United States v. Alphonse Cirillo, et al. 73 CR 352

Dear Sir:

I have been informed by Judge Judd's Law Clerk that the suppression motions in the above-captioned case will be heard either on June 4th or 5th, 1973.

Copies of all of the tapes for both court-ordered wire interceptions are available for listening and/or duplicating at the office of Martin Hershey, Chief, Narcotics Section, Brooklyn District Attorney's Office. Please contact Mr. Hershey to make arrangements at 643-8096. Copies of the logs of these interceptions will be provided to assist counsel.

On this date, I expect transcripts of all of the conversations now intended to be used by the government in its direct case to be forwarded to defense counsel.

Please agree among other defense counsel as to a convenient time at which a video tape of a meeting among the defendants Cirillo, Murphy, Venetucci, and Sorrentino can be viewed.

Very truly yours,

ROBERT A. MORSE
United States Attorney

By s/ Guy L. Heinemann/de
Guy L. Heinemann
Assistant U.S. Attorney

cc: Hon. Orrin G. Judd
United States District Judge
Eastern District of New York

Dictated but not signed s/ Guy L. Heinemann/de

EXHIBIT C - LETTER DATED JUNE 15, 1973
ANNEXED TO PETITION FOR REHEARING

United States Department of Justice

UNITED STATES ATTORNEY
Eastern District of New York
Federal Building
Brooklyn, N.Y. 11201

June 15, 1973

Harold Borg, Esq.
123-60 83rd Avenue
Kew Gardens, New York

Re: United States v. Alphonse Cirillo, et al. 73 CR 352

Dear Mr. Borg:

Enclosed please find in chronological order a copy of the daily log sheets for the Court-authorized wiretap on your client's telephone. Happily, this time the Xerox reproduction was quite good. Only a few pages appear to be beyond legibility. When you need to look at those pages, please contact me to use my copy or contact Assistant District Attorney Martin Hershey to use his copy.

It is my understanding that you will share this copy with all other defense counsel.

I am also arranging to have marked as exhibits my copy of both the Cirillo and Sorrentino wiretap logs.

Very truly yours,

ROBERT A. MORSE
United States Attorney

By s/ Guy L. Heinemann
Guy L. Heinemann
Assistant U.S. Attorney

Enc.

cc: Hon. Orrin G. Judd
U.S. District Judge
Eastern District of N.Y.

Arnold E. Wallach, Esq.
253 Broadway
New York, New York

Martin Stewart, Esq.
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Brooklyn, New York

William Simon, Esq.
2749 Atlantic Avenue
Brooklyn, New York

EXHIBIT D - LETTER DATED JUNE 15, 1973
ANNEXED TO PETITION FOR REHEARING

United States Department of Justice

BY HAND

UNITED STATES ATTORNEY
Eastern District of New York
Federal Building
Brooklyn, N. Y. 11201

June 15, 1973

Honorable Orrin G. Judd
U. S. District Judge
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: United States v. Alphonse Cirillo, et al. 73 CR 352

Dear Judge Judd:

As directed by Your Honor on June 12, 1973, I am enclosing herewith copies of the logs for the Sorrentino and Cirillo wiretaps in the above-captioned case.

I respectfully request that they be marked as Court exhibits and returned to me for safekeeping.

Respectfully,

ROBERT A. MORSE
United States Attorney

By s/ Guy L. Heinemann
Guy L. Heinemann
Assistant U.S. Attorney

Enc.

cc: Harold Borg, Esq.
Arnold E. Wallach, Esq.
Martin Stewart, Esq.
Jacob Lefkowitz, Esq.
Paul Warburg, Jr., Esq.
William Sperling, Esq.
Arnold M. Gelman, Esq.
William Simon, Esq.

ORDER DENYING PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fifth day of June, one thousand nine hundred and seventy-four.

Present:

HON. HAROLD R. MEDINA
HON. WALTER R. MANSFIELD
HON. JAMES L. OAKES

Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

ALPHONSE CIRILLO, a/k/a "Fuzzy", VINCENT MURPHY, a/k/a "Murph", SALVATORE SORRENTINO, a/k/a "Brother", ROBERT VENETUCCI, a/k/a "Bobby", FRANCISCO GUTIERREZ, a/k/a "Frankie", THEODORE ALFRED LILIENTHAL, LAWRENCE CESARE, a/k/a "Larry", and ABE GAVER, a/k/a "Gave",

Defendants-Appellants.

A petition for a rehearing having been filed herein by counsel for the appellant, Robert Venetucci,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

s/ A. Daniel Fusaro
Clerk

UNITED STATES COURT OF APPEALS
FILED

JUN 5 1974
A. DANIEL FUSARO, CLERK

SECOND CIRCUIT